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No. 02-739

In the
Supreme Court of the United States

KIRBY INLAND MARINE, INC. OF MISSISSIPPI, f/k/a BRENT TRANSPORTATION COMPANY, *in personam* and the M/V MISS DIXIE, its engines, tackle, fixtures and appurtenances, etc., *in rem*,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO ~~BRIEF IN OPPOSITION~~

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REPLY TO BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, petitioner respectfully addresses new points raised in the Brief in Opposition.

PRELIMINARY STATEMENT

Even a cursory review of the Union Pacific Railroad Company's ("Union Pacific") Brief in Opposition confirms the gravamen of what Kirby Inland Marine ("Kirby") sought to establish in its Petition for Writ of *Certiorari*—there exists a general state of confusion among the lower courts about how to interpret and when to apply 33 U.S.C. § 512. Therefore, instead of replying point by point to the issues raised in Union Pacific's Brief in Opposition, Kirby will stand on its original Petition for Writ of *Certiorari* and only reply to the few new assertions that merit a specific response.

This reply will therefore focus on the railroad's determined effort to wrongly interpret *I&M Rail Link, LLC v. Northstar Navigation, Inc.*, 198 F.3d 1012 (7th Cir. 1995) in a manner it claims is consistent with *Union Pacific Railroad Company v. Kirby Inland Marine, Inc.*, 296 F.3d 671 (8th Cir. 2002). In addition, Kirby will address Union Pacific's incorrect contention that its railroad bridge has no obligation to accommodate the needs of modern commercial navigation beyond compliance with its original permit. Finally, Kirby will reply to the Union Pacific's mistaken assertions that the railroad would be financially punished if the *Oregon* presumption (158 U.S. 186) were found not to apply and that the Truman-Hobbs Act should be interpreted in a manner that does not change the burden of proof applicable under the presumption.

I. Union Pacific's response acknowledges a conflict between the Seventh and Eighth Circuit Courts of Appeals.

While Union Pacific is quick to maintain that there is no conflict between the Seventh and Eighth Circuit Courts of Appeals, its Brief in Opposition, in fact, acknowledges just such a conflict. Indeed, Union Pacific specifically asserts that in *Folkstone Mar. Ltd. v. CSX Corp.*, 64 F.3d 1037 (7th Cir. 1995), the Seventh Circuit "erroneously cited 33 U.S.C. § 512." (*See* Union Pacific's Brief in Opposition at page 17). In other words, in its skewed defense of the *Union Pacific* decision below, the railroad argues on one hand that *Folkstone* was wrongly decided and on the other that there is no conflict between the two circuits.

However, the Seventh Circuit cited to 33 U.S.C. § 512 in both *I&M* (198 F.3d at 1013) and *Folkstone* (64 F.3d at 1048) because under the jurisprudence of that circuit the statute is not merely a step in a funding process but also the source of an affirmative duty on all bridge owners not to unreasonably obstruct navigation.[1] It is this fundamental belief that is reflected in both *I&M* and *Folkstone* that cannot be reconciled with the *Union Pacific* decision. Accordingly, to defend *Union Pacific* by claiming the decision is consistent with *I&M* and to simultaneously claim that *Folkstone* was wrongly decided is disingenuous.

It should also be noted that Union Pacific expressly concedes that decisions of courts in jurisdictions other than the Seventh Circuit Court of Appeals also directly conflict with the Eighth Circuit Court of Appeals' interpretation of

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[1] Indeed, in *I&M*, the Seventh Circuit Court of Appeals even cited to *Folkstone* for the proposition that "findings in the Coast Guard's report are more than adequate to overcome *The Oregon's* presumption." *I&M*, 198 F.3d at 1016.

33 U.S.C. § 512. These decisions include: *Nassau County Bridge Authority v. Tug Dorothy McAllister*, 207 F.Supp. 167 (E.D.N.Y. 1962) *affirmed* 315 F.2d 631 (2d Cir. 1963); *Port of New Orleans v. Gypsum Transportation Limited*, 263 So.2nd 385 (La. Ct. App. 1972); and *State of Connecticut v. Tug Cynthia Moran*, 607 F.Supp. 24 (D.Conn. 1984). Accordingly, in addition to resolving the clear conflict between the Seventh and Eighth Circuit Courts of Appeals, Kirby respectfully suggests that this Court grant the petition to clarify confusion that exists throughout the country.

II. Union Pacific misinterprets the *I&M* decision on Petition for Rehearing.

Union Pacific also claims that the decision of the *I&M* court on Petition for Rehearing (205 F.3d 333) supports its assertion that the original *I&M* decision of the Seventh Circuit Court of Appeals (198 F.3d 1012) did not find that the Coast Guard's Order to Alter had an effect on the application of the *Oregon* presumption of fault against Kirby. (*See* Union Pacific's Brief in Opposition at page 4). However, there is nothing in the decision on the Petition for Rehearing to support this claim.

Initially, as I&M Rail Link's arguments in the Petition for Rehearing clearly indicate, the railroad in that case understood very well that the underlying decision of the Seventh Circuit Court of Appeals (198 F.3d 1012) had a direct effect on the *Oregon* presumption. In fact, summarizing the railroad's legal citations in the Petition for Rehearing, the Seventh Circuit Court of Appeals noted:

> According to I&M Rail Link, each of these cases stands for the proposition that the Coast Guard's finding under the Truman-Hobbs Bridge Act of 1940, 33 U.S.C. §§ 511-23 that a bridge poses an

> 'unreasonable hazard to navigation' must be ignored in admiralty litigation, *and in particular that such a finding does not affect the rule of The Oregon, 158 U.S. 186, 192-93, 15 S.Ct. 804, 39 L.Ed. 943 (1895), that the moving vessel is presumptively at fault in any allision.*

I&M, 205 F.3d at 334. (Emphasis added).

Nevertheless, Union Pacific quotes a portion of the *I&M* decision on Petition for Remand that includes the following statement:

> We reached the same conclusion: the facts underlying the Coast Guard's decisions concerning the Sabula Bridge imply that shortcomings in its design may have played a causal role in the allision, but whether this is so (indeed, whether the design is deficient) is for the trier of fact.

I&M, 205 F.3d at 335. (*See* Union Pacific's Brief in Opposition at page 4). Union Pacific asserts that this statement somehow supports its position that the *Oregon* presumption applies and that the towboat company would still bear the burden of proof at trial. However, in light of the *I&M* court's earlier holdings, it is instead clear that this quotation merely confirms that any trial would proceed with no presumption applying against either party.

Indeed, describing how the facts at trial might develop, the *I&M* court previously held:

> Perhaps [the pilot] should have reversed the MEGAN BEESECKER's engines rather than attempting to use the Illinois channel; perhaps he blundered earlier when using the current to line up for the transit; but perhaps this was one of the allisions that are to be expected given the clash between an 1880 design and the nature of modern

> traffic on the Mississippi. [Citations omitted]. *The trier of fact must give an answer without resort to presumptions.*

I&M, 198 F.3d at 1016. (Emphasis added). Accordingly, despite the Union Pacific's self-serving efforts, there is no room here for a revisionist rewrite of *I&M*.

Indeed, even the Eighth Circuit Court of Appeals unequivocally acknowledged the conflict. In its decision below, the Eighth Circuit Court of Appeals stated, "to the extent that the *I&M Rail Link* case can be interpreted to hold that a Coast Guard's Order to Alter rebuts and overcomes the *Oregon* presumption, as a matter of law, we respectfully disagree." *Union Pacific*, 296 F.3d at 678.

III. Union Pacific also misinterprets the *I&M* decision on remand.

Similarly, Union Pacific, as did the Eighth Circuit Court of Appeals (296 F.3d at 677-678), misinterprets the *I&M* district court's decision that followed remand. *See I&M*, 2001 WL 460028. The decision on remand had nothing to do with the application of a presumption. Indeed, the opinion instead expressly states, "in this order, the court addresses various motions *in limine* filed by both sides, along with I&M's Waiver of Jury Demand." *Id.* at 1. (Emphasis in original).

In a section of the decision entitled "I&M's Motion to Exclude Evidence of Other Similar Accidents," the district court addressed the issue of whether evidence of other allisions with the bridge would be admissible at trial. *Id.* at 3-5. In this analysis, the district court noted that the Seventh Circuit Court of Appeals had referred to prior allisions and Coast Guard reports in its earlier opinion regarding the *Oregon* presumption. *Id.* at 4. The district

court concluded that while the appellate court did find that the Coast Guard reports and evidence of prior allisions was relevant to the issue of whether the *Oregon* presumption applied, said finding did not have an impact on the issue of whether prior allisions were substantially similar enough to be admitted into evidence. *Id.*

It is difficult to understand what relevance the *I&M* district court's decision on remand has to the issues being presented to this Court. Indeed, the district court merely stated that the issue of whether Coast Guard reports and evidence of prior allisions could affect the application of the *Oregon* presumption is entirely different from and had no bearing on the issue it was addressing at the time, whether particular evidence should be admitted at trial. Accordingly, the *I&M* district court said nothing new about the application of the presumption and the citation to the district court's decision on remand by both Union Pacific and the Eighth Circuit Court of Appeals is therefore without merit.

IV. The Union Pacific's duty not to unreasonably obstruct navigation is dynamic.

The gist of Union Pacific's Brief in Opposition is that because its bridge was constructed under a valid permit, albeit at the beginning of the last century, it has no responsibility to ever conform to the needs of modern commercial navigation. This assertion is simply false. Initially, as reported in the Detailed Report of the United States Coast Guard that was prepared pursuant to 33 C.F.R. § 116.20, "when the bridge was originally built in 1888 and modified in 1907 it was conditional on the rebuilding of the bridge

when required by navigational interests."[2] In addition, "all bridges are obstructions to navigation and are tolerated only as long as they serve the needs of land transportation while allowing for the reasonable needs of navigation." 33 C.F.R. § 116.01(a).[3] Accordingly, contrary to the assertion of the railroad, the Union Pacific's duty is dynamic, as it must change its bridge with the times and the paramount needs of navigation.

V. The Union Pacific would not be financially penalized if this Court leveled the playing field.

Union Pacific asserts that it would be financially penalized if the *Oregon* presumption was found not to apply against vessels that strike bridges that have been found to be unreasonable obstructions to navigation. However, if it were held that the *Oregon* presumption did not apply to such a bridge or if this Court found that the Coast Guard's Order to Alter triggered the *Pennsylvania* rule (86 U.S. 125) and thereby rebutted the *Oregon* presumption, as a matter of law, the only result would be that a trial would proceed like any other case—with plaintiff bearing the burden of proof. Such an outcome can hardly be described as financial punishment.

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[2] This fact was mentioned in Kirby's Writ of *Certiorari* and was not disputed in the Union Pacific's brief. *See* Supreme Court Rule 15.2.

[3] *See also S.C. Loveland, Inc. v. East West Towing, Inc.*, 608 F.2d 160, 165 (5th Cir. 1979) ("Bridges are obstructions to navigation and the right of navigation is paramount, land traffic is subservient.").

VI. The federal government prohibited unreasonable obstructions to navigation before the *Oregon* presumption came into being.

Union Pacific also asserts that because the Truman-Hobbs Act was enacted after *The Oregon,* 158 U.S. 186, 15 S.Ct. 804 (1895) was decided, 33 U.S.C. § 512 must be read in a manner that does not alter application of the presumption. However, the federal government has been prohibiting the unreasonable obstruction of navigable waters since at least 1884. *See* 23 Stat. at L. 133, 148 chap. 229. Accordingly, Union Pacific's sequence of events is wrong. What is significant about the Truman-Hobbs Act in this context is that while it provides a method for bridge operators to obtain federal assistance in altering their bridges, it evidences no intent to shield them from liability if a bridge becomes an unreasonable obstruction to navigation. In short, the railroad has failed to establish (and Kirby submits that it cannot establish) that this Court meant for the presumption of negligence to apply even in those cases where the bridge was previously determined to be an unreasonable obstruction to navigation.

CONCLUSION

The important issues presented to this Court, which are intimately related to prior Supreme Court precedent, federal legislation, and interstate commerce have been dealt with in a conflicting manner by the various courts that have considered them. Because of the inconsistency among these courts, neither the railroad industry nor the maritime industry has a clear understanding of the applicable law. The decision below has further confused this area of law. For all of the reasons stated in Kirby's Writ of *Certiorari* and in this Reply, the petition should be granted.

Respectfully submitted,

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